United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1304

TO BE ARGUED BY

Robert J. Carroll

Pro Se

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

RESPONDENT

VS

ROBERT J. CARROLL

and DOROTHY CARROLL

APPELLANTS

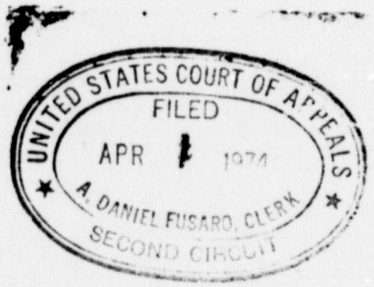
- - - - - - - - - - - - - - - - - - -x

Docket No 74-1304

BRIEF OF APPELLANTS

- - - - - - - - - -

AND APPENDIX



Robert J. Carroll

and Dorothy Carroll

Appellants Pro Se

3111 Aurelia Court

Brooklyn New York 11210

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - - -x

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RESPONDENT

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VS

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APPELLANTS PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court - Eastern District, New York, Costantino, M. United States District Judge, entered on January 3, 1974, denying appellants motion to vacate and set aside a judgment heretofore entered in favor of respondent pursuant to Rule 60 (B) of the Federal Rules of Civil Procedure.

THE FACTS IN BRIEF

The facts have been set forth in detail in the affidavit in support of the Motion to Vacate. For the convenience of the Court however, the facts briefly are as follows.

At the suggestion and order of Judge Zavatt to have the parties to this action reach a compromise settlement, appellant made an offer in settlement after much discussion with Assistant United States Attorney Stuart C. Goldberg. The record will show that appellant made every effort to learn if a decision was rendered in Washington, D.C. where he was told determination would be decided. After approximately one year appellant in an effort to learn the status of the offer was told that another Assistant United States Attorney was handling the

matter at which time I learned that the Respondent took no action whatsoever on the original offer. I then began subsequent negotiations with other Assistant United States Attorneys and after investigations by Agents of the Internal Revenue Service and the Federal Bureau of Investigation made at the request of Assistant United States Attorney Thomas A. Illmensee in an effort to determine my financial status I again made an offer on October 18, 1971. This second offer was made after much discussion with Assistant United States Attorney Illmensee concerning my ability to make payment of the outstanding obligation. He stated to me that he would recommend acceptance of this offer. On December 20, 1971 I received a letter from Mr. Illmensee (copy annexed hereto) advising that my offer had been referred to the Attorney General for his determination and that I would be notified if the offer was accepted or rejected. Again I heard nothing from the government regarding this offer and repeatedly telephoned and called in person at the office of the United States Attorney for about one year to learn what, if anything, happened to my offer. I never received a satisfactory answer but was subjected to threats and abuse. To add to my anguish and anxiety the Government then resorted to the harrassment of my wife by having the United States Marshall serve an income execution on her employer on two separate occasions. The second income execution was levied by the Government after I had a written agreement, which is in the governments files, stating that no such action would be taken during this litigation. Further evidence of the Government's deception concerning the appellants. After much argument and remonstration on my part the Government rescinded the order for the income execution. I tried for several months to see the Chief Assistant United States Attorney in Charge of the Fines and Claims Section, a Mr. Rosenzweig, but was unsuccessful. Upon my insistent

urging an appointment was arranged and I visited the office of Assistant United States Attorney Rosen weig on January 24, 1973. After a preliminary discussion which lasted about five m[illegible]tes Mr. Rosenzweig handed me the certified check that I sent to the Government on October 19, 1971 as my offer to settle this tax matter. He then asked me to sign a receipt that the check was returned which I did. I asked him why they held my check for over 15 months without taking any action on my offer. We then got into a very heated discussion when I accused the Government of practicing a deliberate deception and misrepresentation by getting me to sign a Consent Judgment and then failing to follow the guidelines and suggestion of Judge Zavatt. He then made the threat to me which I quote in my Motion to Vacate. After some further discussion I asked him what it was the Government wanted in order to settle this matter. He then and there telephoned the Department of Justice in Washington, D.C. and asked someone there what they would accept as a settlement in this matter. He asked me to call him in about a week at which time he should have an answer for me. I called him about one week later which would have been about February 1, 1973. I asked him if he had heard from Washington, D.C., regarding my tax matter and he denied having called Washington. I am sure it would be possible to get a record of the phone calls from his office to learn if such a call was made.

On February 13, 1973 I received a letter from the Government (copy of which was annexed to my Motion to Vacate), which in effect stated that the Government was demanding the entire amount and would make no settlement. I immediately contacted Mr. Ralph Mahon, Legal Assistant, who signed this letter in an effort to learn who ordered this action. He could not or would not tell me who ordered this action. By now it was quite obvious to me that the Government had

perpetrated a gross fraud and deception upon me and my wife. For the next several months I made serious efforts to renegotiate our original agreement without success. Finally as a last resort I saw no alternative but to institute the Motion to Vacate and set aside the Judgment by Consent. I would never have agreed to this Judgment had I known that the Government would have acted as they did.

The foregoing is in no way controverted by the Government in their answering Affidavit in opposition to the Motion to Vacate.

THE QUESTIONS INVOLVED

1. Was the District Court in error in denying the Motion to Vacate as not being timely made?

2. Should the District Court have taken into account the circumstance that the "delay" was caused by the conduct of the Government and not the appellant?

POINTS TO BE CONSIDERED

The motion was made within a reasonable time of the discovery by the Appellants of the fraud and misconduct of the Government.

The decision of the lower court appears to hold that if the Motion to Vacate is being made pursuant to Rule 60 (B) - subdivision (3), the motion is not timely in that it is being made more than one year after the entry of the Judgment to which it is addressed, and if it is being made pursuant to Rule 60 (B) subdivision (6) it must be denied because a motion under subdivision (6) must be based upon grounds other than those specified in subdivisions 1 through 5. The District Court, noting that the motion is based essentially on the alleged fraud of the Government, concludes that it is therefore a subdivision (3) motion which must be denied because of the one year limitation.

The facts herein present a situation which does not appear to be taken into account either expressly by Rule 60 (B) or by the District Court, that is: the discovery of the fraud, misrepresentation and misconduct of the respondent after

the expiration of the one year limitation.

As the statement of facts indicates, appellants first discovered the Governments misconduct on February 13, 1974 as a result of a letter of said date a copy of which was annexed to the affidavit in support of the motion to vacate. As the record indicates the substance of the letter was, in effect, that the Government would not compromise appellants tax liability. This was directly contrary to Judge Zavatt's order and suggestion to settle this matter.

As the Court will note the Motion to Vacate was brought on by an order to Show cause dated November 9, 1973, which is only nine months after the discovery by the appellants of the bad faith and fraudulent intentions of the Government. As the statement of facts indicates the appellants acted immediately upon the receipt of the letter of February 13, 1973 in an effort to resolve this matter in accordance with the instructions of Judge Zavatt and brought the Motion to Vacate only as a last resort when it became apparent to the appellants that the Government had no intention of following the suggestion and order of the District Court. The Governments statement in its affidavit in opposition to the motion to vacate "that the government is not obligated to accept any offer to compromise the judgment" is further proof that the Government never intended to act in good faith in connection with a settlement as suggested and ordered by Judge Zavatt.

For the foregoing reasons it is readily apparent that the motion to vacate was made within a reasonable time. If Rule 60 (B) is to be construed in the manner set forth by the District Court, neither the appellants herein nor any

party simularly situated can seek relief from a Judgment to which they consent in good faith and subsequently find more than one year later that the Judgment Creditor, in this case the Government, has acted in bad faith in obtaining the Judgment.

CONCLUSION

Under the facts herein Appellants are entitled to relief either under subdivision (3) or subdivision (6) of Rule 60 (B) of the Federal Rules of Civil Procedure.

Respectfully submitted,

Robert J. Carroll

Robert J. Carroll Pro Se

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

JDP:TAI:aj
650368

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

December 20, 1971

Mr. Robert J. Carroll
3111 Aurelia Court
Brooklyn, New York

Re: U.S. v. Robert J. Carroll, et al.

Dear Sir:

Your offer to compromise the Government's tax judgment has been transmitted to the Attorney General for his determination.

You will be notified in writing when a determination to accept or reject the offer is made.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By Thomas A. Illmensee
Thomas A. Illmensee
Assistant U.S. Attorney

65C 354 UNITED STATES OF AMERICA vs. ROBERT J. CARROLL ET ANO

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
3-31-65	Complaint filed. Summons issued.	1	$55
5-5-65	Summons returned and filed. Defts served on 5/1/65.	2	
5-19-65	By DOOLING, J.- Order filed extending time for defts to answer complaint to July 19, 1965. (1) (P/C mailed to attys) HMS	3	
10-20-65	Pltff's interrogatories to deft Robert J. Carroll filed.	4	
11-19-65	Pltff's notice to take the deposition of Pltffs on 12/2/65 filed	5	
12-8-65	Defts' notice to take the deposition of Pltff by Hymab Boller on Dec 17, 1965 filed.	6	
12-10-65	ANSWER of defendants filed. (Affid of srv by mail on 7/16/65)	7	
12-10-65	Deft Robert J. Carroll's answers to Pltff's interrogatories filed.	8	
12-14-65	NOTE OF ISSUE AND STATEMENT OF READINESS FILED.	9	
11-30-67	Before ZAVATT, CH. J.- Case called - Marked Ready Dec 4, 1967 and assigned to Judge Rosling for Trial.		
12-8-67	Before ROSLING, J.- Case called returned to Judge Zavatt, Ch.J. no prospect of early readiness.		
12-8-67	Before ZAVATT, CH. J.- Case ordered ready for trial or assignment on 12/11/67 before Zavatt, Ch. J.		
12-11-67	Before ZAVATT, CH. J.- Case called - Marked Ready.		
12-12-67	Telegram to Judge Zavatt, Ch. from Robert J. Carroll filed.	10	
12-19-67	Before ZAVATT, CH. J.- Case called - TRIAL ORDERED & BEGUN Trial continued to Dec 20, 1967, at 10:30 A.M.		+
12-20-67	Before ZAVATT, CH. J.- Case called - Trial resumed - Trial continued to 12/21/67 at 10:30 A.M.		'
12-21-67	Before ZAVATT, CH. J.- Case called - Trial resumed - Trial adjd to Dec 26, 1967, 10:00 A.M.		'
12-21-67	By ZAVATT, CH. J.- JUDGMENT BY CONSENT FILED. It is ordered that pltff recover from defts $23,965.36, plus interest, and that pltff recover costs as taxed by the Clerk. (P/C mailed to attys) (J/C)	11	957
11-8-73	By COSTANTINO, J. - Order to show cause dtd 11-7-73 for an order vacating judgment entered 12-21-67, without proof of service filed.	12	
11-9-73	Before COSTANTINO, J. - Case called for hearing on order to show cause to vacate judgment. Motion argued. Decision reserved.		
11/16/73	Affidavit of Bradford Spielman filed.	13	
1-3-74	By COSTANTINO, J. - Order dtd. 1-3-74 denying deft's motion to vacate & set aside the consent decree filed. (p/c mailed to atty)	14	
1-30-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	15	✓

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA,

Plaintiff,

CIVIL ACTION

Index No. 65-C-354

vs.

ROBERT J. CARROLL and
DOROTHY CARROLL,

Defendants.

X

INDEX ON APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
v.	:	65-C-354
ROBERT J. CARROLL and DOROTHY CARROLL	:	MEMORANDUM and ORDER
	:	JAN 3 - 1974

A p p e a r a n c e s:

Bradford Spielman, Assistant United States Attorney, E.D.N.Y. for the United States

Robert J. Carroll and Dorothy Carroll, pro se

COSTANTINO, D.J.

Defendants have moved for an order vacating and setting aside a consent judgment entered into on December 21, 1967 between them and the United States. The United States opposes the motion on the ground that the period of time within which a motion for relief from judgment can be granted, pursuant to Federal Rule of Civil Procedure 60(b), has long since expired.

The judgment entered into here arose as the result of an assessment for income taxes due to the Internal Revenue Service. The amount agreed upon was $23,965.36. According

to the defendants no attempt was made to execute on the judgment until February 13, 1973. In the interim defendants allege that they made several attempts to settle the matter for lesser amounts and that through their own investigation they discovered that their offers were never sent to the appropriate authorities for acceptance. The government alleges that the defendants agreed to make monthly payments but none has been received since July 15, 1969.

Defendants have specified that their Rule 60(b) motion is based upon either reason (3)(fraud, misrepresentation, or other misconduct of an adverse party), or (6) (any other reason justifying relief from the operation of the judgment). Federal Rule 60(b) says that motions under reasons (1) through (3) must be made not more than one year after the judgment has been entered into. Serzysko v. Chase Manhattan Bank, 461 F.2d 699 (2d Cir. 1972), cert. denied 409 U.S. 893, reh. denied 409 U.S. 1029 (1972). Accordingly, reason (3) is untimely.

The court has the power to grant equitable relief from final judgments pursuant to Rule 60(b)(6), but several conditions must exist before a court can use this power. First, the party seeking relief must do so within a reason-

able period of time. Second, the motion must be based on something other than one of the first five reasons in Rule 60. Finally, the relief must be justified. Serzysko v. Chase Manhattan Bank, supra; 7 Moore's Federal Practice ¶ 60.27[1] (2d ed. 1970); United States v. Erdoss, 440 F.2d 1221, 1223 (2d Cir. 1971), cert. denied, Horvath v. United States, 404 U.S. 849 (1971).

Here the motion was made November 5, 1973, almost six years after the signing of the consent decree and the defendants are complaining of the government's misconduct in not accepting their offers of settlement. The relief request is not justified because the time lapse was unreasonable and the motion is in reality based on a Rule 60(b)(3) reason.

Accordingly, defendants' motion to vacate and set aside the consent decree is denied.

U. S. D. J.